United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-7176

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDY DINKO, individually and on behalf of the members of the National Maritime Union of America,

75 Civ.524(HFW)

Plaintiff,

B

-against-

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime Union of America, ABRAHAM E. FREEDMAN, LEON KARCI MER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officers' Pension Plan and individually, and The AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

Defendants.

APPENDIX

PLAINTIFF-APPELLANT APPEALS ON THE ORIGINAL BRIEF.

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANDY DINKO individually and on behalf of the members of the National Maritime Union of America,

Plaintiff,

75 Civ. 524 (HFW)

-against-

NOTICE OF APPEAL

SHANNON J. WALL, as President of the National Maritime Union of American and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America & individually PETER BOCKER, JAMES MARTIN & RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually ANDREW RICK, as New York Branch Agent of the National Maritime of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former trustees of the National Maritime Union Officers' Pension Plan and Individually, and the AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan.

Defendants.

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FILED
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U.S. DISTRICT COURT

Notice is hereby given that Andy Dinko, individually and on behalf of the members of the National Maritime Union of America, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment dismissing the complaint on the ground that the Court lacks jurisdiction over the subject matter of the action entered in this action on the 4th day of March 1976.

DATED: OZONE PARK, NEW YORK
MARCH 30, 1976

Andy Dinko

ANDY DINKO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ANDY DINKO individually and on behalf of the members of the National Maritime Union of America,

Plaintiff,

- against -

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officers' Pension Plan and individually, and THE AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

Defendants.

----------x

ORDER

75 Civ. 524 (HFW)

HENRY F. WERKER, D. J.

This matter having been referred to the Honorable Sol Schreiber, United States Magistrate to hear and report on the financial circumstances surrounding the application by plaintiff Andy Dinko for leave to appeal in forma pauperis, and

Magistrate Schreiber having presented to this court his findings and

conclusions and the defendant having submitted his exceptions thereto, and

The court having read the report and exceptions, it is now

ORDERED that the report of Magistrate Schreiber, dated October 8, 1976 be confirmed and adopted, and it is further

ORDERED that plaintiff's petition to appeal in forma pauperis be granted.

SO ORDERED.

DATED: New York, New York

November 19, 1976

Henry F. Werker

U. S. D. J.

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PLAINTIFFS

DINKO, ANDY et al

DEFENDANTS WERKER, J.

WALL, SHANNON J. ET AL

(SEE ATTACHED LIST FOR FULL TITLE)

JUDGE WERKER

CAUSE

21 USC 501; breach offiduciary and statutory duties against union officials under National Maritime Union pension plan

sls

ATTORNEYS

Harold B. Foner
188 Montague St.
Bklyn, NY 11201 624-5775

9-4-75 subst.
Melvin E. Rosenthal
277 B'way, NYC 10007
964-8330

for defts' Wall, et.al. (also Freed
Abraham E. Freedman
346 West 17th St., NYC 10011 - 929-8
The Amalgamated Bank of New York:
Szold, Brandwen, Meyers & Altman
30 Broad St., NYC 10004 - 422-1777
Deft. Segal:
Willkie Farr & Gallagher
1 Chase Manh. Plaza, NYC 10005
248-1000

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.O. NUMBER	STATISTICAL CA CARD	DATE MA
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U.S. DISTRICT COURT DOCKET

DC-111

75 CIV. 524 ANDY DINKO ET AL V.S SHANNON WALL ET AL

JUDGE WERKER

TITLE PAGE

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Judge

ANDY DINKO individually and on behalf of the members of the National Maritime Union of America,

Plaintiff,

-against-

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officers' Pension Plan and individually, and The AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan.

Defendants.

DATE	NR.	-- page 2 PROCEEDINGS
02-04-75		Filed complaint and issued summons.
02-04-75		Filed order granting leave to commence an action as indicated. Frankel, J.
02-14-75		Filed defts notice to take depositions of pltf. on 2-21-75
02-14-75		Filed ANSWER of defts' Wall, Barisic, Bocker, Miller and Rich AEF
02-27-75		Filed summons and Marshals returns - served: Shannon T. Wall by Mr. Stan on 2-7-75 Joseph Curran on 2-21-75 Mel Barisic by Mr. Stan on 2-7-75 Peter Bocker by Mr. Stan on 2-7-75 (corrected name: not Mr. Stan - it is James Martin by Mr. Stan on 2-7-75 Mr. Stan Gruber Rick Miller by Mr. Stan on 2-7-75 Andrew Rich by Mr. Stan Gruber on 2-7-75 Abraham E. Freedman by Mr. Stan Gruber on 2-7-75 Leon Karchmer -- unable to serve Martin E. Segal by Aldo DeNovellis on 2-14-75 The Amalgamated Bank of New York by Mr. J. Titone on 2-10-75
02-25-75		Filed ANSWER of deft. The Amalgamated Bank of N.Y. SBM&A
02-24-75		Filed ANSWER of deft. Freedman A.E.F.
03-14-75		Filed stip and order that the time for defendant Martin E. Segal to move or answer is extended to March 24, 1975. So Ordered. - Werker, J.
04-02-75		Filed stip. and order that the time of defendants Martin E. Segal is ext. to 5-1-75- Werker, J. (to answer)
03-07-75		**Filed deft's affdvt. and notice of motion to dismiss for failure to appear for exam. (pltf's failure) - ret. 3-14-75**
03-07-75		**Filed deft's memorandum in support of above motion**
04-03-75		**Filed memo endorsed on motion to dismiss: This motion is granted unless pltf. submits to deposition on 4-15-75 at 10 AM at the USDC - SD of NY. So ordered. - Werker, J. m/n**
04-01-75		PRE-TRIAL CONFERENCE HELD BY WERKER, J.
03-31-75		**Filed ANSWER of deft. Joseph Curran** AEF
05-07-75		Filed pltf's affdvt. and notice of motion to disqualify Attorney of record for certain defendants; to enjoin expenditure on National Maritime Union of Am. etc. ret. 5-14-75
05-07-75		Filed, plaintiff's memorandum in support of above motion
05-02-75		Filed defts interrog.
05-09-75		ed stip. and order that the time of deft. Segal to answer is ext. to 5-15-75 thout further extensions. -- Werker, J.
05-16-75		ed deft. Segal's affdvt. and notice of motion to dismiss - ret. 5-29-75
05-29-75		ed pltf's memorandum in opposition to deft. Segal's motion to dismiss.
05-29-75		Filed pltf's affdvt. of Edward O. Howard.
05-28-75		**Filed defts' affdvt. and notice of motion for an order dismissing the complaint. ret. on June 3, 1975.**
05-28-75		**Filed defts' memorandum of law in opposition to pltf's motion to disqualify and in support of defts' motion to dismiss.**
06-17-75		Filed stip. and order that pltf. shall have until June 23,1975 to reply to the affdt. in opposition and cross motion made by defts. Wall,etc. in response pltfs. motion to disqualify Abraham Freedman as said defts. atty. So ordered, Werker, J. (HFV)
08-06-75		Filed pltf's affdvt. of Edward O. Howard in opposition to defts. affdvt.
08-06-75		Filed pltf's memorandum of law in opposition to deft's motion to dismiss and in suppo of pltf's motion.
08-06-75		Filed memo endorsed on deft. Segal's motion to dismiss: Motion grsnted. See memorandum. So ordered. - Werker, J. m/n
08-06-75		Filed MEMORANDUM-Decision #42928... For reasons stated herein, the order granting leave to commence this action is vacated. Defendants motion to dismiss the complai is granted. This Court lacks jurisdiction over the subject matter of the instant action. The motion to dismiss the complaint is granted without prejudice to pltf.

continued page 3

DATE	PROCEEDINGS
08-06-75	Opinion #42938 -- continued from page 2: in bringing a new action once the procedural requirements of sections 501(b) have been fully complied with. So ordered. - Werker, J. m/n
08-06-75	Filed memo endorsed on pltf's motion filed 5-7-75: Motion denied as moot. So ordered. -- Werker, J. m/n
08-20-75	Filed pltf's affdvt. of Edward O. Howard in response to pltf's motion for an order replacing this firm as his attorneys. (CHH+H)
08-20-75	Filed pltfs. notice of appeal to the USCA from the final judgment dismissing complaint. (copies mailed)
08-13-75	Filed JUDGMENT--ORDERED that the complaint is dismissed and that the moving defts. recover their costs from pltf. Clerk m/n
09-04-75	Filed pltf's affdvt. and notice of motion to substitute Attorney for pltf. ret. 8-19-75
09-04-75	Filed meme endorsed on above motion to substitute: Motion granted. So ordered Werker, J. m/n
08-25-75	Filed Bill of costs taxed in favor of all defendants in the sum of $608.40 and docketed as JUDGMENT #75,699
09-25-75	Filed notice that the record on appeal has been certified and transmitted to t USCA for the 2nd Circuit.
11-12-75	Filed notice that the supplemental record on appeal has been certified and transmitted to the USCA for the 2nd Circuit.
03-04-76	Filed OPINION #43993...This case was remanded to me by the USCA for further proceedings consistent with its opinion. The order authorizing this action is vacated and the complaint dismissed for the reasons stated herein. So ordered. -- Werker m/n
03-15-76	Filed true copy of USCA order with opinion attached, that the judgment of the District Court is reversed in part and that the action is remanded to said D.C. for further proceedings consista with the opinion of this court with costs to abide the event. (no bill of costs or statement attached) m/n
03-31-76	Filed plaintiff's notice of appeal to the USCA for the 2nd Circui from judgment of the District Court dismissing the complaint. m/
05-10-76	Filed notice that the record on appeal has been certified and transmitted to the USCA for the 2nd Circuit.
05-28-76	Filed defts affdvt. in opposition to pltfs motion for leave to ap in forma pauperis (on motion for leave to appea
06-11-76	Filed Memorandum-endorsement-ORDER/that this matter be referred Magistrate Schreiber to be set down for a hearing and that a rep be received by the court thereafter as praticable and ordered th the endorsement dated 5-25-76 entered on this motion submitted plaintiff (for leave to appeal in forma pauperis) is declared r and void. So ordered. - Werker, J. m/n by pro-se clerk.
06-11-76	Filed pltfs motion to appeal in forma pauperis with endorsement that motion is granted. - Werker, J. (this memo was was declare null and void by above entry.)
10-12-76	Filed DUPLICATE ORIGINAL OF MAGISTRATE SCHREIBER"S REPORT dtd.10 m/n
10-22-76	Fld exceptions to magistrates report & recommendation

over

Dinko vs. Wall

DATE	PROCEEDINGS
11-22-76	Filed Order that the report of Magistrate Schreiber dated 10-08-76 be confirmed and adopted; ordered that pltfs motion to appeal in forma pauperis be granted. -- Werker, J. (mailed copy to pltf. ~~pro se~~ thru his counsel)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ANDY DINKO, individually and on behalf of the members of the National Maritime Union of America,

Plaintiff,

- against -

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officers' Pension Plan and individually, and THE AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

Defendants.

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OPINION

75 Civ. 524 (HFW)

HENRY F. WERKER, D. J.

This case was remanded to me by the Court of Appeals for further proceedings consistent with its opinion.[1]

Upon the original motion to vacate an order authorizing this action I dismissed the complaint upon the grounds that the plaintiff had not made a sufficient demand (the Court of Appeals reversed this conclusion) and that the

plaintiff had not shown "good cause."

Before the opinion of the Court of Appeals in this case there was no existing definition of good cause as required by Title 29, section 501(b) LMRDA.

A definition has now been furnished in the following terms:

> "We believe that both these policies are served if good cause in section 501(b) is construed to mean that plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence."[2]

The Court of Appeals based upon that definition has instructed me to articulate my reasons why in my sound discretion I came to the conclusion that the plaintiff's application did not show sufficient good cause to warrant the initial authorization to bring this action.

The gravamen of plaintiff's complaint is contained in paragraphs 9 and 15 (a) through (n) in the First Cause of Action. The Second Cause of Action and the allegations made therein arise from the acts complained of in the First Cause of Action. The Second Cause of Action must necessarily be dismissed if good cause is not shown in the First Cause of Action.

No hearing was held in this matter since I concluded that none was necessary. I had available to me the deposition of the plaintiff and all of the documents with respect to the allegations of plaintiff which were refuted by defendants by documentary evidence not argument. I assumed that I was permitted to proceed on documentation outside the complaint and upon admissions made by the plaintiff and the defendants.

Paragraph 9 of the complaint purports to allege the contents of the demand contained in plaintiff's letter to the Union dated December 17, 1974. It does not.

The claims in that letter were

(a) The regular November meeting of the Union held on November 25, 1974 was invalid and unconstitutional.

(b) The vote at said meeting approving the Staff Pension Plan was invalid and unconstitutional.

(c) The change in policy was not spread in full in the National Maritime Union Pilot.

(d) The change in policy must be published in full not by description in both English and Spanish.

Pilot issue not timely

(e) The membership was not permitted to speak at the meeting of November 25, 1974.

There follows a demand for a complete accounting of all Union expenditures "involving the officers Staff Pension Plan."

The Constitution (as amended October 1972) of the National Maritime Union of America (NMU) provides as follows:

"Article 4

MEMBERSHIP APPROVAL

Section 1 -- Principle: All decisions of the National Council, and the National Office between Conventions, which change the established policies, programs, and procedures of the Union must first be approved by the membership before they are made effective.

"Sec. 2 -- Method: Membership approval referred to in Section 1 of this Article shall be obtained in the following manner:

(a) The decision of the National Council and/or the National Office shall be spread in full in the NATIONAL MARITIME UNION PILOT or a special newsletter, provided that action on the decision is not required before the PILOT or special newsletter can be published and distributed to the membership. The decision shall then be read at the regular membership meeting in each Branch office operated by the Union, provided that in the event a regular

membership meeting is not scheduled within the time necessary for action upon the decision, the decision shall then be read in full at a special membership meeting called for that purpose. After discussion by the membership, action upon the decision shall be taken by vote of the membership present. The approval of a majority of the total members voting in all Branches shall be required in order to make the decision operative."

"Article 24

MEETINGS

"Section 1-- Regular membership meetings shall be held at Headquarters (New York Branch) and in all Branch offices of the Union at least once each month. . . ."

Section 5 of that Article provides that minutes of the meetings of any of the Branches shall be forwarded to the National Secretary-Treasurer. It also provides that "meetings held without a quorum present may not initiate any actions where membership approval is required."

There is no provision in this Article which specifies a time for notice before a regularly scheduled monthly meeting.

With respect to paragraph 15(a) of the complaint and the related allegations in paragraph 9 of the complaint and the first five paragraphs of plaintiff's letter to the Union, I compared the NMU Staff Plan and the NMU Officers Plan (Exhibits 8 and 9) and came to the conclusion that the "changes" in policy set forth in the notice to all members contained in the Pilot were set forth in full within the meaning and intendment of section 2, Article 4 of the NMU Constitution. While I realize that it might be argued that the words "in full" could be construed to mean that the full text of the new plan should be set forth, in my opinion that would have been a distortion of the meaning of the requirement that the "decision" was to be set forth. The notice contained a cogent, concise explanation of the changes and made the full text available at the Branch offices.

Furthermore, the same section of the Constitution which requires the decision to be spread in full also requires the decision to be read at the meeting at which the membership is to vote on its approval. The court cannot conceive that it was within the intention of the drafters of the Constitution that the Meeting Chairman must read the new plan in its entirety. To interpret the word "decision" consistently within that paragraph, the court concludes that the published explanation of the substantive changes, which is not inaccurate, incomplete, misleading or deceptive as charged by the plaintiff, satisfes the requirement that the decision be set forth in full.

With respect to paragraph 15(b), the court considered the statements of Evaristo Rodriquez and Emanuel Van Eckelen in this connection since plaintiff relied upon alleged statements to him by these gentlemen as to the availability of the proposed plan at the New York and Philadelphia Branch offices.

With respect to paragaphs 9 and 15(e) of the complaint and the 6th and 7th paragraphs of plaintiff's letter. I examined the minutes of all of the Branches including New York which were held on November 25, 1974 (Exhibits 10 through 36 and Exhibit 40) and came to the conclusion that all meetings were properly called and that they were conducted in accordance with Article 4. While the minutes of some of these meetings would from the standpoint of a corporate attorney leave a great deal to be desired, they reflect in my opinion the basic requirements of the Union Constitution. Those basic requirements are the presentation of the proposed changes, an opportunity for the membership to discuss those changes and a vote by show of hands in most cases which is reflected in a count recorded in the minutes. The fact that discussion in the New York Branch was terminated after a motion was duly made and seconded to do so in no way

reflected bias by the Chair. The action was not taken until there had been considerable discussion of the Plan and many members had had an opportunity to express their opposition.

It should be noted that upon a cursory examination of the minutes of the other Branches, even if the New York vote was not counted, the other Branch meetings where a quorum was present were sufficient to carry the proposed plan.

Furthermore, as to the fifth paragraph of plaintiff's letter since the meetings were regularly scheduled meetings the request for three months notice made by plaintiff was not warranted and could improperly affect the regularity of the meetings.

With respect to paragraph 15(c) of the complaint, there is no requirement under the Union Constitition that either the changes or the plans be made available to the membership in Spanish. Annexed to the complaint is a Spanish version of the spread in the Pilot. If any of the Union membership could not read English, this Spanish spread gave them notice of the "decision."

Incidentally minutes of the meetings held in Panama, Cristobal and San Juan were included in the documentation thus negating paragraph 15(n) of the complaint.

The observations made above require the conclusion that the allegations contained in paragraphs 15(a), (b), (c), (e) and (n) do not show good cause.

In determining whether plaintiff had good cause with respect to paragraph 15(d) of the complaint the court had reference to Title 29 sections 307(a) and 308(b)[3] which deal specifically with the rights of participants and beneficiaries under welfare and pension plans. Since Mr. Dinko is neither a participant nor a beneficiary of the Officer or Staff Plans it came to the conclusion that he had no standing to make the demand alleged in 15(d). Furthermore, under section 307(a)

even a participant or beneficiary is not entitled to anything but a description of the plan.

The only other section under which there was a possibility that he might have standing is Title 29, section 431.[4] That section requires the Union to file a report showing the provision made and procedures followed with respect to "participation in insurance or other benefit plans." § 431(a)(5)(C). Furthermore it requires the Union to file a detailed annual report. Section 431(c) gives any member of the Union the right to books, records and accounts necessary to verify the Union's annual report upon a showing of "just cause." Section 431(c) does not however require the Union to provide "an independent financial report or other adequate financial information." It permits the membership for "just cause" to develop that information by examination of the books and records. It is not alleged or claimed that the Union has not filed and published these annual reports as required by §§ 307 and 431. I therefore came to the conclusion that plaintiff would in no event be entitled to the demands made in the last paragraph on page 1 and the first paragraph on page 2 of his letter of December 17, 1974.

The complaint does not allege any failure to either file or publish annual reports or a failure to make those annual reports available to the membership. As a matter of fact Mr. Dinko stated at his depositions that periodic financial reports were published in the Pilot.[5]

Paragraph 15(f) claims that the officers failed and refused to make available information as to "true and complete liabilities." Similiar conclusory charges are made in 15(g), (h), (i), (j), (k) and (l). The Secretary's requirements with respect to the Union's annual report are exhaustive and specific in regard to each of these items. (See § 431(a) and (b).) A reading and rereading of plaintiff's deposition indicates that all of plaintiff's allegations in these several areas were

allegedly based upon hearsay statements by other Union members whose names were either unknown to plaintiff or whose names could not be remembered by plaintiff. While the complaint is written upon information and belief I have come to the conclusion that the information upon which a party bases his belief must be such as to provide to an average person a reasonable cause to believe. Upon consideration of plaintiff's deposition I concluded that the information given to plaintiff and upon which he based his belief was not such as an average person would rely upon to make a claim. The information at best could be classified as rumor or what sailors know as scuttlebutt.

Lastly paragraph 15(m) alleges a failure to inform the Union that 80% of the Union's funds were on deposit with the defendant Amalgamated Bank of New York. There is no requirement that officers of a Union inform the membership as to its depository nor any right on the part of the membership to dictate what depository shall be used.

The manner in which this complaint was filed and the subsequent publicity given to it and the charges made against the officers indicate at least bias on the part of the plaintiff against certain Union officers. This may be due to disappointments suffered by plaintiff in the internal affairs of the Union. It may not however form the bases for charges which appear to the court to have little prospect of success upon the merits.

I therefore find upon all of the foregoing that plaintiff has not shown a reasonable likelihood of success nor has he shown a reasonable ground for the belief of the existence of the material facts alleged in his complaint. He has not shown either good cause under Title 19, section 501 nor just cause under Title 19, section 431(c). The order authorizing this action is consequently vacated and the complaint disinissed.

SO ORDERED.

DATED: New York, New York

March 2, 1976

Henry F. Werker
U. S. D. J.

DINKO v. WALL, et al., 75 Civ. 524

NOTES

1. Dinko v. Wall, Civil No. 75-7502 (2d Cir., Feb. 13, 1976).

2. Id. at 1930.

3. Section 307 states as follows:

> (a) Publication of the description of the plan and the latest annual report required under this chapter shall be made to the participants and to the beneficiaries covered by the particular plan as follows:
>
> (1) The administrator shall make copies of such description of the plan (including all amendments or modifications thereto upon their effective date) and of the latest annual report available for examination by any participant or beneficiary in the principal office of the plan.
>
> (2) The administrator shall deliver upon written request to such participant or beneficiary a copy of the description of the plan (including all amendments or modifications thereto upon their effective date) and an adequate summary of the latest annual report, by mailing such documents to the last known address of the participant or beneficiary making such request.

Section 308(b) states as follows:

> (b) Any administrator of a plan who fails or refuses, upon the written request of a participant or beneficiary covered by such plan, to make publication to him within thirty days of such request, in accordance with the provisions of section 307 of this title, of a description of the plan or an annual report containing the information required by sections 305 and 306 of this title, may in the court's discretion become liable to any such participant or beneficiary making such request in the amount of $50 a day from the date of such failure or refusal.

4. The entire text of section 431 is as follows:

> (a) Every labor organization shall adopt a constitution and by-laws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information --
>
> (1) the name of the labor organization, its mailing address,

and any other address at which it maintains its principal office or at which it keeps the records referred to in this subchapter;

(2) the name and title of each of its officers;

(3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;

(4) the regular dues or fees or other periodic payments required to remain a member of the reporting labor organization; and

(5) detailed statements, or references to specific provisions of documents filed under this subsection which contain such statements, showing the provision made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other benefit plans, (D) authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the reporting labor organization files with the Secretary the annual financial report required by subsection (b) of this section.

obtain

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year --

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

(c) Every labor organization required to submit a report under this subchapter shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

5. Continued Deposition of Andy Dinko, Apr. 22, 1975, at 187.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 469—September Term, 1975.

(Argued January 12, 1976 Decided February 13, 1976.)

Docket No. 75-7502

ANDY DINKO, individually and on behalf of the members of the National Maritime Union of America,

Plaintiff-Appellant,

—against—

SHANNON J. WALL, as President of the National Maritime Union of America and individually, et al.,

Defendants-Appellees.

Before:

ANDERSON, FEINBERG and MULLIGAN,

Circuit Judges.

Appeal from dismissal of complaint in the United States District Court for the Southern District of New York, Henry F. Werker, *J.*, for lack of jurisdiction because of inadequacy of demand to union to sue and failure to show good cause required by 29 U.S.C. § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959.

Reversed as to former and remanded as to latter holding.

MELVIN E. ROSENTHAL, New York, N.Y., *for Plaintiff Appellant.*

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STANLEY B. GRUBER, New York, N.Y. (Abraham E. Freedman; Wall, Curran, Barisic, Becker, Martin, Miller, Rich and Freedman, on the brief), *for Defendants-Appellees.*

FEINBERG, *Circuit Judge:*

Andy Dinko, a member of the National Maritime Union of America, appeals from a judgment of the United States District Court for the Southern District of New York, Henry F. Werker, *J.*, dismissing plaintiff's action, brought individually and on behalf of members of the Union, against various past and present officers of the Union and Trustees of a current union pension plan and its predecessor. The complaint alleged that defendants had committed various breaches of fiduciary obligations imposed by the Labor-Management Reporting and Disclosure Act of 1959 (the Act), 29 U.S.C. § 501(a).[1] The district court held that plaintiff had not complied with the requirements of the Act, 29 U.S.C. § 501(b), that he first request the Union to sue on its own behalf and that he show good cause for the legal action. We reverse the first ruling and remand for further findings on the second.

I. *Facts*

The relevant facts may be stated briefly. On December 17, 1974, plaintiff wrote two of the defendants, demanding that a vote on a recent proposed revision of a union pension plan be declared void. Plaintiff set forth the basis for his demand and claimed that the vote was illegal under both federal law and the union constitution. Plaintiff also demanded an accounting of union expenditures and benefits under the plan, an independent audit, and other measures to protect union members against alleged "continuous misappropriation" of union funds. Plaintiff's letter is reproduced in the margin.[2]

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1 Section 501(a) provides:

> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

2

December 17, 197

National Maritime Union of America
346 West 17th Street — Att: Mel Barisic
New York, N.Y. 10011 — Secretary-Treasurer of N.M.U

Gentlemen:

Notice is hereby given that the regular November meeting of th Union, held on November 25, 1974, was conducted in an uncon-titutiona manner. Further notice is given that the vote at said meeting on th proposed revision of the National Maritime Union Officer's Pensio Plan and its Trust Agreement, was invalid and unconstitutional.

The Constitution of the National Maritime Union provides that whe there is a change of policy, membership approval is necessary.

The Constitution further provides that for the membership act, th change "shall be spread in *full* in the National Maritime Unio Pilot . . .".

The proposed revision was not spread in *full* but was merely set fort in the Pilot as a description. For the membership to have adequat notice, the proposed revision must be published in the Pilot in *full* i both English and Spanish.

In January 1975, in accordance with the unusual provisions of section 501(b) of the Act,[3] plaintiff sought the district court's permission to sue defendants on behalf of the Union. The application was ex parte as permitted by section 501(b). Judge Marvin E. Frankel, by order dated January 27, 1975, granted leave to proceed. After defendants served their answers, they took plaintiff's deposition and served written interrogatories. In May, plaintiff moved to disqualify the Union's counsel as attorney for these defendants and to enjoin the expenditure of union funds for their defense. See *Tucker* v. *Shaw*, 378 F.2d 304 (2d Cir. 1967). Relying on portions of plaintiff's deposition and other documents, defendants cross-moved to dismiss the complaint. By this time, the case had been assigned to Judge Werker. In August 1975, the judge granted defendants' motion in an unpublished memorandum opinion. The basis of the district court's decision was that plaintiff had not met two requirements of section 501(b): Plaintiff had failed to request that the Union "take court action" before bringing his suit, and he had not made "an adequate showing of 'good cause'." On appeal, plaintiff claims that the district court erred in both respects.

Demand is hereby made that the vote on the proposed revision be declared void. In the event the proposal is again submitted to the membership it should be published at least three (3) months prior to the meeting at which it is voted. Publication should be in English and Spanish. The meeting shall be conducted pursuant to the Constitution, allowing members their right to speak on the motion.

At the meeting of November 25, 1974, the membership was not permitted to speak on the proposed revisions and in violation of the National Maritime Union Constitution.

I, Andy Dinko, N.M.U. book number S-51380 demanded several times from the Chairman of the Meeting to speak on this proposal but refused to be recognized by the Chairman and was ordered several times to sit down and shut up. This violates my guarantee of free speech, under the Landrum Griffin Act.

I demand a complete accounting of all Union expenditures involving the officers Staff Pension Plan and all benefits associated therewith. In addition I further demand a true and accurate accounting of all Union officers and staff, who are participating recipients in this plan, as well as monies expended or allocated for each individual, family benefits and health benefits, etc.

I further demand that an outside independent certified public accountant be selected to audit all expenditures of the N.M.U., and a Membership Watch Dog Committee be set up including outside impartial observers to see that members will be protected against the continuous misappropriation of Union Funds.

I demand that no monies be used out of the N.M.U. General Treasury for the Officers Staff Pension Plan. Further, I would consider any expenditure of Union Monies for the Officers Staff Pension Plans as both illegal and unethical; and I herewith, give notice that you and all the National Officers will be held personally liable for the repayment of these funds. The Court has provided ample precedent in the case; Morrisey vs. Perry et al.

If you do not reply within ten (10) days from the above date, I will immediately instruct my attorneys to proceed with the Law Suits in the Federal Courts.

Sincerely,

ANDY DINKO
N.M.U. Book No. S-51380
(Member in Good Standing)

3 Section 501(b) provides:

> (b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

II *Demand to Sue*

Section 501(b), see note 3 supra, authorizes any union member to bring suit in a federal district court or state court against union officials for alleged violations of section 501(a) only if

> the labor organization or its governing board or officers refuse or fail to sue or[4] recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so . . .

by the union member. Plaintiff argues that his letter of December 17, 1974, and the Union's inaction thereafter, met this requirement. Judge Werker held that the letter was an insufficient request because:

> Nowhere in the letter of December 17 does the plaintiff request that the officers of the NMU initiate court action to achieve the demands made by him [plaintiff].

The question of what constitutes a sufficient request under section 501(b) has not been litigated frequently in this circuit. In *Coleman* v. *Brotherhood of Railway, etc.*, 340 F.2d 206 (1965), we affirmed the dismissal of a claim against union officials under the Act because plaintiff there had made no demand to the union at all. The case is therefore not on point except for the emphasis in the opinion that:

> [T]his [request] provision of the statute is mandatory and . . . its requirements cannot be met by anything short of an actual request. An allegation of the futility of such a request will not suffice. Together with the further requirement of a showing of good cause and of securing court permission to proceed, the provision requiring a request is clearly designed to protect union officials from unjust harassment. If it is to serve the purpose for which it was included, it must be given full effect.

340 F.2d at 208.

A few years later, the issue was raised more directly. In *Cassidy* v. *Horan*, 405 F.2d 230 (1968), we held, with one judge dissenting, that a letter demanding that union officers return certain sums of money and advising that otherwise "further steps which the Act permits will be taken" did not satisfy the statutory requirement of demand to sue. Then Chief Judge Lumbard characterized the majority opinion as "unduly technical" on this issue, asserting that "[t]he only question" was whether there had been "the kind of request" required by section 501(b) and that a demand to bring suit "was implicit" in the letter.[5] 405 F.2d at 233.

There are no other cases in this court explicitly dealing with the problem. In *Head* v. *Brotherhood of Railway, etc.*, 512 F.2d 398 (1975), *Coleman* and *Cassidy* were referred to approvingly in a footnote, id. at 398-99 n.1, but there was no demand to sue construed in that case because it was decided on other grounds.[6] District court cases in this circuit are also sparse and have reached conflicting results.[7]

4 The "or" has been unanimously construed to mean "to." E.g., *Cassidy* v. *Horan*, 405 F.2d 230, 232-33 (2d Cir. 1968); *Persico* v. *Daley*, 239 F. Supp. 629, 630-31 (S.D.N.Y. 1965); *Penuelas* v. *Moreno*, 198 F. Supp. 441, 443 (S.D.Cal. 1961).

5 See Note, The Fiduciary Duty Under Section 501 of the LMRDA, 75 Colum. L. Rev. 1189, 1195 n.29 (1975), criticizing the majority opinion.

6 Cf. also *Morrissey* v. *Curran*, 423 F.2d 393 (2d Cir.), cert. denied, 397 U.S. 928, 400 U.S. 826 (1970), in which the sufficiency of plaintiffs' demand was not discussed.

7 Compare *Wimbush* v. *Curran*, 356 F. Supp. 316 (S.D.N.Y. 1973) with *Levinson* v. *Perry*, 71 LRRM 2554 (S.D.N.Y. 1969), and *Persico* v. *Daley*, supra note 4.

In other circuits, the demand requirement has been regarded more casually. See, e.g., *Sabolsky* v. *Budzanoski*, 457 F.2d 1245, 1252-53 (3d Cir.), cert. denied, 409 U.S. 853 (1972); *Hood* v. *Journeyman Barbers*, 454 F.2d 1347, 1354, n.23 (7th Cir. 1972). Indeed, we have found no decision of another circuit court holding a suit barred by the requirement.

We believe that Judge Werker erred in concluding that either *Coleman* or *Cassidy* controlled his ruling on this issue. Those decisions require compliance with the prerequisites mandated by the statute. The plaintiff here met those conditions. The letter, appropriately addressed to the Union, demanded "a complete accounting" and "a true and accurate accounting"; the statute can be satisfied by a request "to sue [to] recover damages *or secure an accounting* or other appropriate relief." (Emphasis added). While this language has been construed to mean a demand for an accounting in a legal proceeding,[8] the words of plaintiff's letter, which echo those of the statute, should also be so construed.

We agree with the majority in *Coleman*, supra, 340 F.2d at 208, that the requirements of section 501(b) were designed "to protect union officials from unjust harassment." As will be seen in Part III of this opinion, we take that statutory purpose very seriously. However, the fiduciary responsibility created by the Act is designed to protect union members, who may be of limited education and are rarely represented by counsel when sending letters to their union. The interpretation of section 501(b) as a whole must reflect a balancing of both of these two important policies. Keeping these considerations in mind, we hold that plaintiff's demand for an "accounting" satisfied the request requirement of section 501(b).

8 E.g., *Penuelas* v. *Moreno*, supra note 4.

III *Good Cause*

We turn now to the other basis of Judge Werker's decision. Section 501(b) also provides that "No such proceeding [to sue union officials] shall be brought except upon leave of the court obtained upon verified application and for good cause shown . . ." The judge held that plaintiff had not made an adequate showing of good cause. When he so ruled, Judge Werker had before him a number of documents, including plaintiff's verified application for leave to sue, a lengthy affidavit of defendants' attorney, and plaintiff's deposition. Plaintiff's verified application contained a variety of charges of wrongdoing, which can be roughly summarized as alleging an improper revision of the union's officers' pension plan, the withholding of certain financial and membership data from plaintiff and other union members, and the misappropriation of union funds. Defendants' affidavit answered each of plaintiff's many charges in detail and offered evidence that plaintiff's charges were, for the most part, based on unbelievable hearsay or his own credibility, which is, according to defendants, nonexistent.

Judge Werker did not discuss plaintiff's charges or defendants' response. Stating that he had the benefit of defendants' "detailed exhibits . . . particularly the deposition of the plaintiff," the judge merely held that plaintiff had not established "good cause," which he defined only as resting "in the sound discretion of the court." Plaintiff claims that the judge's ruling was both substantively wrong because good cause was established and also procedurally defective because the complaint should not have been dismissed "without a hearing or trial of the allegations."[9]

9 Brief for Plaintiff-Appellant, 13.

The latter contention is easily disposed of. Section 501(b) does not prescribe any procedure for a determination of good cause. The statute explicitly authorizes an ex parte determination, although it does not require it. See *Horner* v. *Ferron*, 362 F.2d 224, 228-29 (9th Cir.), cert. denied, 385 U.S. 958 (1966). There is support for the view that before finding good cause and allowing the action to proceed, the better course is to give union officials a chance to demonstrate that good cause is lacking. *Penuelas* v. *Moreno*, 198 F. Supp. 441, 449 (S.D.Cal. 1961). The same procedural result is reached when, as in this case, the district court determines ex parte that there is good cause but then allows defendants to move, in effect, to vacate that order.[10] See, e.g., *Levinson* v. *Perry*, 71 LRRM 2554 (S.D.N.Y. 1969); *Schonfeld* v. *Rarback*, 61 LRRM 2043 (S.D.N.Y. 1965). We approve of that practice as a practical means of protecting union officials against vexatious and harassing suits, the obvious policy behind this portion of section 501(b). See *Horner* v. *Ferron*, supra, 362 F.2d at 228. In this case, contrary to plaintiff's contention, Judge Werker did hold a hearing although no evidence was taken. In that respect, the judge did not err; to determine good cause no more was required, certainly not—as plaintiff argues—a trial.

Plaintiff's claim that good cause was shown is more troubling. Ordinarily, one needs no permission to litigate under a federal statute. The requirement that plaintiff obtain leave of court upon good cause shown in order to proceed with his lawsuit is an unusual one. Unfortunately, the legislative history is unilluminating as to the content of the requirement. As a result, the courts have been left to wrestle inconclusively with the problem of defining good cause. It has been observed that Congress must have intended more than that a union member has requested the union to sue and the union has failed to do so, *Penuelas* v. *Moreno*, supra, 198 F.Supp. at 444, and the proposition seems reasonable. But beyond that, the reported cases have for the most part not devoted much discussion to defining good cause in this context.

One obvious meaning of good cause could be whether the union member's application for leave to sue states a good cause of action on its face. District courts, familiar with this notion in the context of motions to dismiss, have instinctively embraced it as a minimum basis for good cause. See e.g., *Wimbush* v. *Curran*, 356 F.Supp. 316, 318 (S.D.N.Y. 1973) ("proposed complaint alleges colorable claims"); *Schonfeld* v. *Rarback*, supra, 61 LRRM at 2043 (papers "state a claim upon which relief may be granted"). Both of these decisions, however, also emphasized the facts set forth in the moving papers. See *Wimbush*, supra, 356 F. Supp. at 318 (complaint supported by affidavits alleging "facts which would provide good cause for litigation"); *Schonfeld*, 61 LRRM at 2044 ("a wealth of facts and acts which plainly support" the charge).

The most extensive treatment of good cause is found in *Horner* v. *Ferron*, supra, although the excellent discussion there focuses mainly on the procedural aspects of determining the issue. The court did observe, however, that at a contested hearing, if there was one, the district judge may "look somewhat beyond the complaint." 362 F.2d at 229.

> Thus if the defendant can establish, by undisputed affidavit, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or that the action cannot succeed because of the application of the principles of *res judicata* or collateral estoppel.

10 That two different judges were involved here seems to us irrelevant.

or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application.

However, we think it inappropriate to consider, at such a hearing, defenses which require the resolution of complex questions of law going to the substance of the case. Defenses of this kind should be appraised only on motion for summary judgment or after a trial. Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of summary judgment procedure, are *a fortiori*, beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken.' [Footnotes omitted.]

Id. This discussion clearly comes down on the side of looking to more than the complaint, but how much further is hard to say. We agree that the district judge is not limited to the face of the complaint, if he chooses to go beyond it, as Judge Werker did here in relying on "the numerous detailed exhibits" offered by defendants.[11] But this does not advance analysis as far as is necessary. If an "undisputed affidavit," in the *Horner* v. *Ferron* phrase, establishes a fundamental legal defect in the action, we agree that good cause is not shown. But if the material facts

11 In *Tucker* v. *Shaw*, 378 F.2d 304 (2d Cir. 1967), neither we nor the district judge, 269 F. Supp. 924 (E.D.N.Y. 1966), looked beyond the "detailed factual verified application," which was considered ex parte, in finding good cause.

are in dispute, the problem is more complex. We agree with the point made in *Horner* that since a genuine dispute as to a material fact would bar summary judgment, a fortiori such a dispute is "beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed." Id. The factual showing to institute a suit should be no more demanding than that required to defend it against a motion for summary judgment; indeed, it should be somewhat less, since at the earlier stage a plaintiff has not yet had a chance for discovery and a defendant will still have the later protection of a summary judgment motion.

It has been suggested that good cause in this context should mean that the plaintiff has made a showing of probable cause, with the latter defined as "a reasonable ground for belief in the existence of facts warranting the proceedings complained of." See Clark, The Fiduciary Duties of Union Officials Under Section 501 of the LMRDA, 52 Minn. L. Rev. 437, 466 (1967). The suggestion finds support in an excerpt from the legislative history of the section.[12] Moreover, we have used an analogous concept when plaintiff union members in a section 501 suit move to prevent defendant union officials from using counsel ordinarily employed by the union. In an early case under the Act, we suggested that the test for that relief should be

> whether the plaintiff has made a reasonable showing that he is likely to succeed, and whether the conduct of the defendants is in conflict with the interests of the Union. . . .

12 Senator Javits, one of the sponsors of the Kennedy Ervin bill in the Senate, from which the good cause concept was apparently taken, stated:

> If the member is given leave to sue—in other words, if he shows *some probable cause*—he may sue. . . . [Emphasis added.]

105 Cong. Rec. 6529 (1959).

See *Heideman* v. *Shelton*, 311 F.2d 2, 3 (1962) (per curiam); *Tucker* v. *Shaw*, supra, 378 F.2d at 306-07. "Good cause" is an elastic concept, and is often used as a shorthand summary of the underlying policy reasons why a litigant should be able to attain a specified result.[13] Here, two policies compete: supervision of union officials in the exercise of their fiduciary obligations and protection, through a preliminary screening mechanism, of the internal operation of unions against unjustified interference or harassment. We believe that both these policies are served if good cause in section 501(b) is construed to mean that plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence.

Returning now to the case before us, we do not know what standard of good cause Judge Wyatt applied. We do not fault him for this; the practice has apparently been to determine good cause in a conclusory manner, without any findings or detailed discussion.[14] While findings of fact and conclusions of law are not required in the technical sense, it would be most helpful in a case like this to have a fuller explanation of the bases of the district court decision. Cf. *Horner* v. *Ferrer*, supra, 302 F.2d at 220 n.7. After all, whatever a judge does in this situation has serious implications. Denying leave to sue is usually the end of the lawsuit for plaintiff, and allowing the suit to proceed is, under this statute, also a grave decision. There are numerous allegations in the complaint to which defendants offered a number of varying responses. How the district judge assessed each should be made clear. For example, plaintiff has made a number of factual charges which defendants characterize as "wild" and completely unsubstantiated, and give their reasons for so asserting. If the district judge concluded that plaintiff did not have a reasonable ground for belief in the existence of the facts upon which these allegations are based, it would be helpful if that conclusion and the reasons for it were stated. Similarly, if the claimed defect in publishing the terms of the revised pension plan was on its face legally untenable, the judge should make that basis of his opinion clear.

Accordingly, we remand for further proceedings consistent with this opinion. Costs to abide the event.

13 E.g., the good cause requirement of Fed. R. Civ. P. 35. See *Schlagenhauf* v. *Holder*, 379 U.S. 104, 117-22 (1964).

14 E.g., *Wimbush* v. *Curran*, supra note 7; *Schonfeld* v. *Rarback*, 61 LRRM 2043 (S.D.N.Y. 1965).

PLAINTIFF-APPELLANT APPEALS ON THE ORIGINAL RECORD.

Plaintiff-Appellant acting on his own behalf, hereby appeals in forma paupuis, on the original record without the necessity of an appendix, as authorized by Title 28 USCA Part II, Section 30. Forma paupuis was duly granted by the District Court.

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